

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 21, 2012

v

ROBERT JAMES SALYERS,

Defendant-Appellant.

No. 301539
Macomb Circuit Court
LC No. 2009-003184-FH

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree child abuse, MCL 750.136b(3) and was sentenced, as a second habitual offender, MCL 769.10, to one and one-half to four years' imprisonment for this conviction. Defendant appeals as of right. We affirm.

This case arises out of injuries suffered by an eight month old infant. The crux of plaintiffs' case was in the form of expert testimony. Specially, the infant suffered a hematoma on the surface of her brain and had retinal hemorrhages or bleeding in the back of her eyes caused by blunt force "nonaccidental" trauma to the skull. Defendant argues that the trial court erred by admitting the expert testimony of Dr. Steven Ham and Dr. Kevin Valentine, and thus, violated defendant's right to due process of law. We disagree.

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); MRE 103(a)(1). Defendant did not object to the admission of the expert testimony of Ham or Valentine. Therefore, this issue has not been properly preserved for review. This Court's review of an unpreserved evidentiary issue is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Ackerman*, 257 Mich App 434, 445-446; 669 NW2d 818 (2003). "[This Court] will reverse only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence." *Ackerman*, 257 Mich App at 446, citing *Carines*, 460 Mich at 763-764. Also, if the evidentiary issue requires examination of the meaning of the Michigan Rules of Evidence, a question of law is presented, which this Court reviews de novo. *Ackerman*, 257 Mich App at 442.

According to MCL 750.136b(3), the definition of child abuse in the second degree is if any of the following apply:

- (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
- (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
- (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

"Thus, to establish second-degree child abuse, the prosecution must prove only that a defendant intended to *commit an act* likely to cause harm. The prosecution does not have to prove that a defendant intended serious physical or mental harm." *People v Maynor*, 470 Mich 289, 300-301; 683 NW2d 565 (2004).

MRE 702, which governs the admissibility of expert testimony, requires a three-part test: "(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline." *People v Williams*, 198 Mich App 537, 541; 499 NW2d 404 (1993). "Furthermore, expert opinion testimony will not be excluded simply because it embraces an ultimate issue to be decided by the trier of fact." *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991).

"Although the ultimate issue rule no longer stands in the way of expert testimony stating opinions on crucial questions to be decided by the trier of fact, it is important that the expert witness not be permitted to testify about the requirements of law which apply to the particular facts in the case or to phrase his opinion in terms of a legal conclusion." *People v Drossart*, 99 Mich App 66, 75; 297 NW2d 863 (1980); MRE 704 ("[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact" *Id.* at 73). Where there is no direct evidence of the defendant's intent, the trier of fact may use the opinion of an expert witness to infer the defendant's intent. See *Ray*, 191 Mich App at 708-709 (this Court held that the jury could use the expert opinion testimony of a police officer to infer Ray's intent to deliver a controlled substance).

Here, defendant stipulated to both Ham's and Valentine's credentials, and the trial court qualified both doctors as experts, in pediatric neurology and pediatric critical care, respectively. Ham opined that the infant's injuries were caused by blunt force trauma to the skull, and that, generally, cases of retinal hemorrhages are extremely rare and seen in many cases of nonaccidental trauma. Ham also testified that a CAT scan and radiological image cannot strictly tell how an injury was caused, or who caused the injury. He testified that he was not aware that an extra dosage of Tylenol, as defendant alleges he gave the infant, could cause retinal hemorrhages or a hematoma. Ham further opined that if someone had their baby in a rear facing car seat and they tripped up a small flight of stairs and laid the baby on the top step, also alleged by defendant, this would unlikely cause retinal hemorrhages or a hematoma.

Valentine opined that the infant's retinal hemorrhages were caused by "abusive head trauma," also called "nonaccidental¹ trauma," or a subset category, which is commonly called "shaken baby impact." Valentine opined that abusive head trauma is essentially when the brain is injured by an infliction of injury by another person. Valentine further opined that other than trauma, there was nothing in the medical testing done on the infant that indicated any alternate reason for the infant's retinal hemorrhages. He also opined that shaken baby impact is not the only thing that could cause a subdural hematoma and retinal hemorrhages in an infant. Valentine testified that he had no way of knowing who caused the infant's injuries or exactly when her injuries occurred.

Here, Ham and Valentine opined regarding the crucial question of what type of act caused the infant's injuries, which was to be decided by the trier of fact. See MCL 750.136b(3); *Drossart*, 99 Mich App at 75. We conclude that Ham and Valentine did not state their opinions in terms of a legal conclusion as to whether or not defendant abused the infant or exactly what act caused the infant's injuries. Furthermore, a reasonable jury could have inferred from Ham's testimony that defendant was alone with the infant prior to the manifestation of her injuries, and from Ham's and Valentine's testimony that the infant was injured as the result of nonaccidental trauma, to conclude that defendant knowingly or intentionally committed an act that caused the infant's injuries. See *Ray*, 191 Mich App at 708-709. Therefore, we hold that the admission of Ham's and Valentine's expert testimony regarding the infant's injuries was not error.

Next, defendant argues that because Ham's testimony regarding whether the infant's injuries were chronic did not match his medical report, under MRE 703, Ham's testimony should not have been admitted into evidence. We disagree.

Here, Ham did not author the medical report at issue; resident Todd Francis dictated the report, which concluded the infant's hematoma contained chronic and acute components. However, Ham saw the hematoma and reaffirmed his opinion that it was acute. Therefore, we hold that defendant's argument is without merit because Ham's expert testimony was based on his own perception of the infant and her injuries and not based on the medical report which he did not author. And again, there was no objection by defendant at trial.

¹ We note that the term "accident" has both legal and medical meanings. It might have been better had the trial court instructed the jury to that effect. However, given the experts' testimony that defendant's versions of events could not possibly have caused the child's injuries, any omission by the trial court was harmless.

Here defendant has failed to show that an error occurred. Therefore, we hold that defendant has not avoided forfeiture of this issue under the plain error rule. Thus, reversal is not required.

Affirmed.

/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause